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No. 03-826

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PURPOSE OF SUPPLEMENTAL BRIEF

Petitioner submits her Supplemental Brief to call attention to new cases bearing on Petitioner's first question in her Petition for Certiorari:

> Does this Court's *Desert Palace* decision apply at the summary judgment phase of litigation, and if so, what is its impact?

Since Read filed her Petition for Writ of Certiorari in this matter in November, 2003, district courts, the judiciary's front line ruling on summary judgment motions, have "come to multiple conclusions" about the "potential broader impact of *Desert Palace*" in summary judgment analysis. *Ordahl v.*

Forward Technology Industries, Inc., _ F.Supp.2d _, 2004 WL 213189, *2 (D. Minn. 2004)(Appendix A hereto). A district court within the Fifth Circuit, citing *Read v. BT Alex Brown Inc.*, 72 Fed. Appx. 112 (5th Cir. 2003), has concluded that *Desert Palace* has no impact on summary judgment analysis, that the law the judge applies in ruling on a summary judgment motion is different from the law the jury applies when the case is submitted to the jury for a decision. Federal District Judge Lindsay paraphrases the nonmovant's argument in a Title VII/ADEA case:

> Owens maintains [that *Desert Palace*] dictates that "summary judgment should only be granted in employment discrimination cases if an employer can demonstrate that the employee has failed to raise a genuine issue of material fact concerning whether or not a protected characteristic was a motivating factor in an employment decision." Pl. Am. Resp. At 8. In other words, Owens contends that the [*McDonnell Douglas*] burden-shifting framework is no longer applicable.

Owens v. Excel Management Services, Inc., et al, _F.Supp._ , Civil Action No. 3:02-CV-0835-L (Feb. 13, 2004)(Appendix B, p.5).

Judge Lindsay limits *Desert Palace* to a jury instruction decision and reasons that because *Read*, *supra*, cited to *Desert Palace* but applied the *McDonnell Douglas* burden shifting framework to plaintiff's sex and age discrimination claims, *Desert Palace* has no impact on summary judgment analysis. Judge Lindsay noted:

> If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas*, it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

Id., App. B, p. 6, fn. 4.

Judge Lindsay supplies an analysis of the Supreme Court's meaning in *Desert Palace*:

> If Owen's suggestion that the *McDonnell Douglas* burden shifting paradigm no longer exists after *Desert Palace* is correct, such a change would constitute a revolution in employment discrimination law. If the Supreme Court were going to make *a draconian departure* from 30 years of well-established employment law precedent, the court believes it would have done so with unmistakable clarity. In *Desert Palace*, the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas*.

Id. (emphasis added). *See also* Judge Lindsay's ruling that *Desert Palace* has no impact on summary judgment analysis in *Winter v. Bank of America, N.A.*, _ F.Supp.2d _, 2003 WL 23200278, *3 (N.D. Tex. 2003)(Appendix C hereto).

The district court uses the term "draconian," (defined in the dictionary as "inhumanly severe or cruel"[1]). The district court's view that considering circumstantial evidence the equivalent of direct evidence in summary judgment analysis would be draconian sounds like a policy argument in favor of liberally granting summary judgment motions for employers. Such a view is at odds with this Court's unanimous decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) that criticizes the Fifth Circuit for its approach to summary judgment, an approach that facilitates dismissal of employment discrimination cases and with this Court's unanimous decision in *Desert Palace* that taught juries (and presumably judges) to treat "circumstantial and direct evidence alike . . . ." *Desert Palace v. Costa*, _ U.S. _, 123 S.Ct. 2148, 2154 (2003).

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[1] Webster's New World Dictionary of the American Language, College Ed. 1964, p. 439.

Other district courts have reasoned that *Desert Palace* does impact summary judgment analysis. Some conclude that *Desert Palace* requires that the *McDonnell Douglas* framework be dropped in favor of the process laid out in 42 U.S.C. § 2000e-2(m). *See, e.g., Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 990-93 (D. Minn. 2003).

Other courts have concluded that

> *Desert Palace* necessitates modifying the third step of the *McDonnell Douglas* framework "so that it is framed in terms of whether the plaintiff can meet his or her ultimate burden to prove intentional discrimination, rather than in terms of whether the plaintiff can prove pretext."

Ordahl, *supra* at *3, *citing Brown v. Westaff*, _ F.Supp.2d _, 2004 WL 67654, at *4-5 (D.Minn. 2004)(quoting *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _F.Supp.2d_, 2003 WL 22290229, *15). The district court in *Ordahl* explains:

> In other words, in order to survive summary judgment under the *McDonnell Douglas* analysis, a plaintiff is no longer limited to demonstrating pretext, i.e. that the defendant's asserted reason was false. Rather, at step three, a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a "motivating factor," even though the defendant's legitimate reason may also be true or have played some role.

Id.

The views of these district courts are fundamentally different and critically important. Without a swift resolution of Question One, the courts, the parties, and practitioners are left on the busy, outcome determinative road of summary judgment practice without a map. If *Desert Palace* is the law for judges as well as juries in employment discrimination cases, all the cases that end in summary judgment under

pre-*Desert Palace* analysis will likely be reversed on appeal. Such a course assures untold delay, expense and judicial inefficiency.

CONCLUSION

Petitioner respectfully prays that the Court grant certiorari on her four questions.

Respectfully submitted,

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